FILE COPY

AUG 4 19
WM. R. STAN
C

58085

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 3, Original of 1921

THE STATE OF WYOMING, COMPLAINANT,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, AND THE LARAMIE RESERVOIRS AND IRRIGATION COMPANY, DEFENDANTS.

PETITION FOR REHEARING.

VICTOR E. KEYES,
Attorney General, Solicitor and Counsel for the State of Colorado.
WILLIAM R. RAMSEY,
Assistant Attorney General, Solicitor and Counsel for Colorado.
DELPH E. CARPENTER,
Solicitor and Counsel for The Greeley-Poudre Irrigation District.
JULIUS C. GUNTER,
Solicitor and Counsel for The Laramie-Poudre Reservoirs and Irrigation Company.

L. WARD BANNISTER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 3, Original

THE STATE OF WYOMING, COMPLAINANT,

vs.

THE STATE OF COLORADO, THE GREELEY-POUDRE IRRIGATION DISTRICT, AND THE LARAMIE RESERVOIRS AND IRRIGATION COMPANY, DEFENDANTS.

PETITION FOR REHEARING.

To the Honorable the Judges of the Supreme Court of the United States:

The State of Colorado, The Greeley-Poudre Irrigation District, and The Laramie Reservoirs and Irrigation Company, defendants herein, respectfully present their petition for a rehearing and submit the reasons hereinafter stated in support thereof:

I.

In both the opinion and the final decree, the court inadvertently omitted mention and due recognition of the long-

established diversion and use of water from the headwaters of Deadman creek in Colorado by means of that part or unit of the Divide or Sand Creek system which diverts water from Deadman creek and conveys the same over into Sand creek for rediversion into the Cache la Poudre river. Deadman creek is a tributary of the Colorado portion of the Laramie river, entering that stream a number of miles above the interstate line. Long prior to the initiation of the tunnel project in Colorado or of the more recent projects in Wyoming, the Divide Canal system was constructed and has since hitherto been annually maintained and operated. It includes (1) a canal at the very headwaters of Deadman creek, known as the "Wilson Supply Ditch," whose function has been to divert water from that stream and to convey the same over into the headwaters of Sand creek. This water flows down Sand creek to (2) the Sand Creek or Divide Canal, by means whereof the water from Deadman creek and some water from Sand creek is carried over into Sheep creek, a tributary of the Cache la Poudre, and the remaining waters of Sand creek continue their flow into the State of Wyoming.

The recognition or omission of this diversion in no manner affects the conclusions of the court respecting the water supply at Wood's Landing for the same reasons assigned with respect to the Skyline canal in Colorado, but we respectfully suggest that the failure to specifically recognize this early Colorado appropriation in the final decree may lead to future uncertainty and to the erroneous conclusion that the right of the State of Colorado and of its citizens to continue their diversions from Deadman creek in the future as in the past was not protected by the decree in this case. (See map attached to defendants' answer; Record, fols. 1398, 1607 and

1636; Defendants' Brief, vol. II, p. 133; Defendants' Supplemental Brief, vol. II, p. 91.)

II.

Whatever degree of conclusiveness may be given by this court to the decrees of the courts of the State of Colorado fixing and determining the local status of priorities of appropriation respecting the waters of this stream, such decrees at least should be persuasive.

The priority of the appropriation of the Laramie Poudre Tunnel project was judicially determined by the District Court of Larimer County, Colorado, to be as of August 25, 1902, and the decree of that court is binding and conclusive upon Colorado appropriators. (See copy of decree, Exhibit 179.) If given full faith and credit, it would conclusively and completely dispose of the question of the date of the priority of the tunnel project as of the year 1902 rather than as of the year 1909, adopted by this court. But, regardless of this judicial determination, the facts revealed by the evidence before this court clearly entitle the tunnel project to a much earlier priority than October, 1909, under the doctrine announced by this court in the opinion wherein it is said:

> "As between different appropriations from the same stream, the one first in time was deemed superior in right, and a completed appropriation was regarded as effective from the time the purpose to make it was definitely formed and actual work thereon was begun, provided the work was carried to completion with reasonable diligence" (p. 4).

The evidence which entitles the tunnel project to a priority date of August 25, 1902, or at the very latest of May 22,

1904, is exhaustively reviewed in volume II, pages 138 to 188, inclusive, of the original brief for defendants, and again in volume II, pages 113 to 140, inclusive, of the supplemental brief for defendants, and need not be here repeated. But, constituting as it does the very crux of the case, in view of the fundamental principles announced by the opinion, the date from which this great enterprise may be said to have commenced its undertaking becomes of transcendent importance, and is the guide point controlling the final disposition of the case. In the fixing of this date a misinterpretation of the facts, or a failure to attribute a proper degree of good faith to those whose purpose it was to build the tunnel enterprise or to those who later collected the forces which both started and kept in motion the human as well as the physical elements which finally effected the completion of the project, may work a tremendous and irreparable injury both upon the State and upon those of its citizens whose credit and treasure have been availed of to bring into being one of the instrumentalities by the use of which the State and the people may prosper and endure. We believe an injustice has been done the defendants by the court in this regard, and we earnestly urge a reconsideration of this vital phase of the case.

Briefly stated, the tunnel project (including *three* collection ditches) was definitely conceived in 1902 and surveys were commenced on August 25th of that year and followed by extensive road building in 1903. The first definite survey of the tunnel, on the exact line where later constructed, was made in March, 1904, and on May 22, 1904, another engineer commenced a resurvey of the same tunnel line (Rec., fols. 1891 and 1898). This latter engineer (Duvall)

not only made the definite location of the line of the tunnel where later constructed, but also made a survey of the whole tunnel system, with three collection ditches, *including the Upper Rawah ditch*, and was engineer in charge of the actual construction which proceeded throughout the entire summer on the lines definitely located by him. The first actual ditch construction accrued prior to June 10, 1904, at which date a ditch was completed at the west portal of the tunnel (fol. 1885) and water turned from the West fork of the Laramie across to the East fork. The construction crew then was moved up the valley of the West fork and commenced the first excavation work on the Upper Rawah ditch *upon the final and definite survey made by Duvall.* This ditch collects water from other tributaries of the Laramie and carries the same over into the West fork, where it flows down to the west portal of the tunnel. Every dollar of expenditure in construction made subsequent to May 22, 1904, was directed to the fulfillment of the final designs of the builders represented by Duvall surveys. The tunnel was first definitely located by him on the line where it now operates. He next located the three (not two) ditches leading to the tunnel. The first construction was upon the ditch at the west portal which now conveys water to the tunnel. The next was upon the Upper Rawah ditch on the Duvall line and under his direction, and that canal, now carrying water into the West fork and down to the tunnel, was constructed in conformity with his 1904 stakes. *It was never abandoned.* The other two collection ditches were constructed substantially as located by Duvall, with some insignificant betterments of location. In fact, the large sums of money expended in construction upon the tunnel system between

1904 and the time work was delayed by reason of this suit, were all expended in fulfillment of a purpose to build this very tunnel, and its three collecting canals, definitely formed prior to May 22, 1904. The work of 1902 and 1903 was all availed of and included within the more complete work of 1904. The 1904 surveys were subjected to proof by subsequent checking and surveys of alternate possibilities in the manner demanded by good engineering and prudent investment and along lines ordinarily followed by engineers of the Reclamation Service and private institutions. But the ultimate fact remains that the project has been largely completed and was put into partial operation in 1914 (see folio 4396) in complete harmony with the original plans and upon the lines definitely surveyed and upon which actual construction proceeded during 1904 and subsequent years.

The doctrine of relation is applied with respect to irrigation works in much the same manner and upon somewhat similar principles obtaining with respect to mines. The mining customs, laws, and decisions long since established certain principles with respect to reasonable diligence in the prosecution of work, among which may be mentioned: the building of necessary roads is, in effect, work upon the mines; work upon any one claim of a group or system of claims in legal effect is work upon all the claims, etc. Similar rules apply with respect to irrigation works, and where other and additional units are subsequently incorporated into an established system, they thereafter become a part of the composite instrumentality by which the final reclamation is to be brought about, even though the added units in and of themselves may not be related back to the date of the parent project. The whole problem is that of reason-

able diligence upon the composite project. Reasonable diligence, necessarily, is largely a question of fact and takes into consideration all the surrounding conditions and circumstances. The appropriator is only required to do that which would be reasonably expected of prudent men laboring under similar conditions and undertaking construction of enterprises of like magnitude at similar times. Very few efforts of similar character, difficulties, and magnitude to that of the tunnel project here involved have been undertaken by private capital in the history of irrigation development. There are few analogous cases with which to make comparison. The Federal Reclamation Service furnishes the nearest parallel in the matter of magnitude, but the almost unlimited finances and assisting Federal agencies at the command of the Reclamation Service give advantages not to be expected or required of private institutions. But, even as to such, the eight years involved in the construction and near completion of an enterprise of the magnitude of the tunnel enterprise here involved (from 1902 to the filing of the suit herein) would not be considered an unreasonable time within which to accomplish so great a task, even though unhampered with those other and additional impediments thrown across the path of private undertakings.

The record shows a general continuity of purpose and effort (from 1902 and in any event from 1904) directed toward the identical enterprise now in large part completed. The efforts from the founders down through succeeding builders have finally resulted in the near completion of the original conception. While small variances and departures of detail have occurred, they have but bettered the means of fulfilling the diversion originally contemplated. Such being

the case, to now hold that new projects in Wyoming, first commenced in 1908 and 1909, may be given a preference and priority superior to the tunnel project in Colorado is not only to declare the $800,000 theretofore spent upon the Colorado system, 1902 to 1909, to have been useless and unavailing, but, more, to unjustly deprive the Colorado enterprise of the major portion of its water supply.

We earnestly pray that the court again consider the record for the purpose of establishing the relative priority of the tunnel project, the essential parts whereof appear in defendants' briefs at the pages above indicated and which briefs also contain complete answer to misinterpretations of the evidence; that the tunnel project be found to have its proper priority, and that the waters of the river be reapportioned to conform to the superiority of the tunnel enterprise over the newer and junior enterprises in Wyoming.

III.

In this case Wyoming sought to enjoin the defendants from diverting any water from the Laramie River basin to the Poudre River basin. The court held that the position of Wyoming was "untenable," saying, "In neither State does the right of appropriation depend upon the place of use being within the watershed. Diversions from one watershed to another are commonly made in both States, and the practice is recognized by the decisions of their courts." Wyoming sought an injunction to wholly restrain the diversion of any water by the tunnel project in Colorado upon the ground Wyoming had made prior appropriation of all the waters of the river. The court decreed to Colorado the right to divert

not more than 15,500 acre-feet annually, notwithstanding the claims of Wyoming.

Wyoming contended that it need not provide storage for the high flows of the river. This court held that it was incumbent upon Wyoming to make reasonably adequate provision for such storage in order to effect the conservation of the waters flowing into that State from Colorado.

By reason of the above-mentioned rulings, as well as of other aspects of the case, it is evident, in the final analysis of the case as a whole, the costs should not be wholly assessed against the defendants, but that the costs should be equally divided between the two States in conformity with the usual rule in such cases, especially where relief is granted to both parties. In Kansas *vs.* Colorado, although the complaint of Kansas was dismissed and no relief granted, each party was adjudged to pay its own costs. In boundary disputes between States the general rule is to divide the costs between the parties involved. In numerous instances, with which the court is no doubt familiar, that rule has been applied.

Missouri *vs.* Iowa, 160 U. S., 688.
Indiana *vs.* Kentucky, 163 U. S., 520.
Tenn. *vs.* Virginia, 177 U. S., 501.
Kansas *vs.* Colorado, 206 U. S., 46.
Maryland *vs.* West Virginia, 217 U. S., 1.
U. S. *vs.* Texas, 162 U. S., 1.

IV.

In rendering its decision the court failed to apply the doctrine of equitable apportionment as defined in the case of *Kansas vs. Colorado*. According to the testimony submitted

in this case, Colorado produces more than one-half of the water of the Laramie river. Under the decision herein, Colorado is limited to 37,750 acre-feet annually (Skyline, 18,000, plus Colorado Meadows, 4,250, plus Laramie-Poudre tunnel, 15,500). The court determines the water supply available to the Wyoming lands as follows:

Laramie river at Wood's	170,000	a.-ft.
Little Laramie river	93,000	"
Lower tributaries	25,000	"
Total	288,000	"
Adding the Colorado Trans-mountain diversion and consumption	22,250	"
The total water supply will be	310,250	"

The 37,750 acre-feet annual Colorado allotment is about 13 per cent of the Basin water supply, and the Wyoming allotment is about 87 per cent of the total water supply.

The court analysis evidently omits the North Laramie production of 25,000 acre-feet and Chugwater production of 20,000 acre-feet. Adding these figures, 45,000 acre-feet, to the 310,250 acre-feet, makes a total of 355,250 acre-feet Basin water supply.

Under the court's analysis, Colorado will receive for utilization approximately one-eighth of the Laramie Basin water supply and Wyoming seven-eighths, notwithstanding Colorado produces one-half of the water supply and the more dependable one-half, if that term can be permitted.

The fact that both States within their borders recognize the doctrine of prior appropriation does not take away the

sovereignty of either State. Under the circumstances set forth in this case Colorado has not, in our opinion, received an equitable proportion of the waters of the Laramie river, and, unless, under the facts herein, the court desires to adopt a rule different from that in the Kansas-Colorado case, a greater proportion than one-eighth of the water of the Laramie river should be allotted to Colorado.

It is laid down in Kansas *vs.* Colorado that the proper rule to be applied in case of an interstate stream is that of equitable apportionment of benefits between the States involved. This does not mean a division among States according to the doctrine of *prior appropriation*. Interstate priority is inconsistent with the rule of equitable division.

In ignoring State lines and applying the doctrine of prior appropriation—first in time, superior in right—to controversies between States over interstate streams, it is obvious that the court has departed from the views expressed in the pioneer case of *Kansas vs. Colorado,* 206 U. S., 46.

The decision in the case at bar is apparently committed to the doctrine of prior appropriation between States regardless of State lines in interstate stream controversies. The Kansas-Colorado case favored equitable apportionment. The latter is not governed by any fixed or definite rule that must be followed in all cases, but depends upon the circumstances of each particular case, which, all things considered, will be just, fair, and right.

Equitable apportionment will take into consideration the respective needs of the different States, the quantity of land to be irrigated, the quantity and value of crops per acre which can be grown in each State, the quantity of water contributed by each State to the total volume of the stream, the oppor-

tunity which each State affords for the repeated use of each acre-foot of water diverted, the quantity and value of crops produced by the consumptive use of each acre-foot, the extent of the non-consumptive use in each State as to every acre-foot diverted, and also a consideration of the fact that it is more economical to use water first along the upper reaches of the river and then continue the use along the lower reaches.

If it can be that the degree of sovereignty possessed by a State is not sufficient to authorize the State to create, in favor of its citizens, water rights calling for all of the water contributed by the State to the interstate stream, then we wish to develop for the consideration of the court the alternative rule of "equitable division" laid down in *Kansas vs. Colorado*.

"Priority regardless of State lines" is really "interstate priority," and to whatever extent it exists it is an exclusion of one State in favor of the other and to that extent is a monopoly of the waters of the interstate stream. If, for instance, the appropriators in one State are the first ones to appropriate as much as three-fourths of the water, they get the three-fourths and those in the other State get only one-fourth. If they are the first to appropriate all of the water, they get all and the appropriators in the other State get none. Under this rule, although the resource by nature is common to the citizens of both States, the actual enjoyment becomes exclusive in favor of one State or the other according to the percentage of priority.

The percentage of priority even may be due to nothing but accident. It may turn, for example, on the nearer presence of a railroad to one part of the interstate stream than to another where the land might be even more produc-

tive. It may be due to some colonization scheme under which a certain area for operation is chosen, even without inspecting other areas where the returns would have been greater. The percentage may be accounted for by the financial ability of the appropriators to construct a water project in a certain given area instead of a different one. Again it may be due merely to the fact that the appropriators knew of a possibility in one State, but did not know of an even better one in the other State. Thus "priority regardless of State lines" is interstate priority or interstate discrimination, and, according to its percentage is a monopoly in favor of one State as against the other, is not predicated on State sovereignty or authority in any degree and may not possess even the merit of being supported by economical and productive use of the water thus monopolized. The rule violates the principle of equality of the States as to their political rank and as to their equal right of economical development. The rule of "equitable division," on the other hand, takes account of each State upon the stream. It may always be counted upon to give each State at least a substantial portion of the flow without regard to relative dates of priority. It guarantees, in a small measure, the future of each State. It impoverishes no State to enrich another. It appeals to the sense of equality among the States and makes their respective peoples glad they belong to a Federal Union.

The injustice of the rule of interstate priority contended for by Wyoming appears in marked degree in this very case. Under the application of the rule of "interstate priority" Colorado would receive, as found by the court, only a very small part of what it produces, while Wyoming not only receives all it contributes, but nearly 80 per cent of the

amount produced by Colorado. Yet Colorado's lands are just as productive—in fact, far more productive—per acre than those of Wyoming, and her rank as a State is equal. How unjust must be that rule which can produce such a result as between member States of the same Union. The only respect in which the working of the rule might be more unjust would be in the event that appropriators of Wyoming should have been the first to appropriate all of the water of the stream found in both States instead of only most of it, in which event Colorado would have had none.

Although nations may not be so obligated by law, their practice in respect to international rivers reveals the fact that as to commercial navigation these streams are not subject to monopoly by any nation, but are treated as natural resources, subject to a community of interest on the part of coriparian nations and frequently in favor of even non-riparian nations.

By various treaties, beginning with the treaty of Paris in 1814, the Rhine, Neckar, Main, Moselle, Meuse, Scheldt, Po, Congo, Danube, Niger, Elbe, Wesser, and Amazon rivers have been subjected to the principle of community of commercial navigation in favor of the coriparian nations, and in many instances in favor of non-riparian nations.

> Kaeckenbeeck, International Rivers (published by Sweet & Maxwell, Ltd., for the Grotius Society), sections 43-77, 99-125, 181-265, 266, 305-8, 324-326.

The United States, by treaties with Spain, Great Britain, and Mexico, has extended the principle of community of

commercial navigation to the Mississippi, St. Lawrence, and the Great Lakes and to the Rio Grande.

Kaeckenbeeck, International Rivers, sections 324-325.

I Malloy's Treaties and Conventions, article XXVI, p. 711, and article XXX, p. 712, and articles VI and VII, page 1111, and article IV, page 1123.

Uses of international streams for irrigation seem to follow the same community principle.

The treaty between the United States and Mexico of 1906, concerning the Rio Grande, allocated to Mexico 60,000 acre-feet per annum out of a reservoir which was to have been constructed near Engle, New Mexico, the delivery of the water to be in the bed of the Rio Grande at the headgate of Acequia Madre, above Juarez, Mexico (I Malloy's Treaties and Conventions, arts. I and II, pp. 1202 and 1203)

The United States and Great Britain, by the treaty of 1909, concerning varicus boundary waters, including the Milk river, which rises in the province of Alberta, Canada, and flows into the State of Montana, and including the St. Mary river, which rises in the State of Montana and flows into the province of Alberta, declared the two rivers should be treated as one and should be divided equally, and then specifically allocated: to the United States, in respect to the Milk river, a priority of right to 500 cubic feet per second or so much of such amount as should constitute three-fourths of the natural flow, and to Canada, in respect to the St. Mary river, a priority of right to 500 cubic feet per second of the flow of that river or so much of such amount as should constitute three-fourths of the natural flow, leaving the remainder in each instance to the other country (III Charles, Treaties and Conventions, art. VI, p. 42).

Although the priority of right which is agreed to is spoken of in that treaty as an "appropriation," yet it is evident, from the even numbers used in terms of cubic feet as to each river and from the even proportions exchanged and from the equal division, that the allocation could not have been made upon any basis of regard for dates of application to use along the two rivers in the two different countries, but that each country recognized that the other had an equality of right and interest in these international streams and to the waters thereof.

Surely one State of our own Union should be treated by other States, under a judicial rule to be formulated, as favorably as one nation would be treated by another.

The principle of equitable division or apportionment, if adopted as the interstate rule, will lead to greater wealth production in the arid region than will the principle of interstate priority. Every one familiar with irrigation knows that the lands which cannot have water because of scarcity, but which, nevertheless, lie in the vicinity of lands which do receive water, are more useful, other things being equal, than those lands not near enough to be used in connection with the areas which are irrigated. With irrigated lands as a base, dry farming is more easily and safely extended to the non-irrigated lands, and so, too, the use of these lands is more frequent and valuable for grazing purposes. It is best, therefore, from the standpoint of maximum productivity, that the irrigated areas be well scattered throughout the arid region. If it happens, under a system based on appropriation regardless of State lines, that the early priorities are fairly evenly divided between the two States, then the irrigated areas will be well distributed, but if the great

bulk of the earlier priorities belong to a single State, then the resulting monopoly or near monopoly of the waters of an interstate stream consolidates the irrigated areas within that particular one of the States, and the available and dependent dry areas with their production likewise become correspondingly limited. Under the principle of equitable division a wide diffusion of irrigated lands is always guaranteed, because the principle accords to each State a substantial portion of the waters of the interstate stream. It is scarcely necessary to point out that the greater productivity resulting from a system based upon an equitable division or apportionment of the water admits of the maintenance of a more widely diffused and greater population.

The rule of "equitable division" favors government reclamation work in the arid region. The rule of "interstate priority" retards it. Hitherto Government projects have been looked upon as a blessing to all the western States. Hitherto, however, it has not been supposed that a Government project on an interstate stream carried with its heavy withdrawal of water any priority against subsequent uses and appropriations of water in other States on the same stream. Indeed, in the rule laid down in *Kansas vs. Colorado*, the States thought they had the assurance that no such priority was to be feared. If now the rule is to be changed, then the Government reclamation project in any one State becomes a deadly menace to the later development of every other State upon an interstate stream, and the other States must stand like a wall against consent by Congress to the construction of any such project.

How different under the rule of "equitable division"! Under this rule each State upon the stream knows that it

may have an equitable portion of the water and may parcel out that portion within its own boundaries under any system of water rights which it may choose—riparian, appropriation, or both riparian and appropriation combined, as in several of the western States—and that no State need fear the blight of "interstate priority," and that no State need fear that it is going to be robbed of its water by a Government project in a neighboring State upon the same stream.

In choosing a rule to govern distribution between States, it would seem that one should be chosen which will permit the development of every State and not allow one State to be enriched at the expense of another.

"Equitable division" is entirely feasible. As between States which are riparian in their water systems and as between States where one is priority and the other is either riparian or riparian and priority combined with the priority rights carved out of and derived from previously existing riparian rights, "equitable division" is the only rule which can be applied. "Interstate priority" or "priority regardless of State lines" in such a case becomes unworkable, since it is impossible to divide waters according to priorities regardless of State lines when on one side of the line the water rights are riparian and not priority rights or else are riparian and priority rights combined. If the rule for which we contend is possible as between such States, it is equally possible between purely priority or appropriation States, such as Colorado and Wyoming.

There are still other evidences of its feasibility. Irrigation, through the exercise of riparian rights, is a lawful and well-known use of water in the ten western States in which the dual system of riparian rights and appropriation rights

prevails, just as is true of the appropriation or priority rights also. As between the various riparian rights upon which water is drawn from any single stream in any one of these States, priorities of use become immaterial and there is left, as the principle governing distribution among the riparian proprietors, only the well-known rule that each riparian proprietor may make a reasonable use of the water of the stream subject to the equal right of the other riparian proprietors likewise to make a reasonable use. This, in substance, is the rule of "equitable division," although applied among individuals rather than between States.

Although irrigation does not greatly prevail in the eastern States, the rule governing other uses is the general rule of equality in the right to make a reasonable use which, although sometimes difficult of ascertainment on application, is nevertheless found feasible as a working basis of administration.

As applied to the Laramie river, in the present case, the topographical conditions are such that Colorado cannot divert more than about 85,000 acre-feet per annum, which, considering her contribution to the volume of the river, and considering the needs of both States, surely would be within her "equitable division."

Counsel argue that because the States of Wyoming and Colorado apply the priority principle within their own respective boundaries that therefore it should be applied as between them. They overlook, however, two factors involved in that suggestion. One relates to the origin of the priority system; the other to the political character of the States.

The priority appropriation system owes its origin to the scarcity of water and to the necessity of using it upon lands

non-riparian as well as riparian. Better for the community welfare where water is scarce that some should have enough to put to beneficial use than that the supply should be so minutely divided that no one could have enough. Better, therefore, in the arid region a system of priorities based upon respective dates of appropriation than the riparian system which is based upon the theory of equality in the right to make a reasonable use and which knows no limit upon the number of water users less than the number who can acquire lands riparian to the stream. Geographically, a State is an area large enough to accumulate a volume of water in its different streams, sufficient in respect to any such stream to supply the uses of many appropriators within the State on a basis worth while in point both of nature and extent of use and in point of administration. A priority system, therefore, may well be adopted and applied within an area as small as that of a State. It is not at all necessary, in order to insure its successful operation, that it should function in an area that is more extensive.

As for the other factor overlooked, which is the political status of the State, an entity partially sovereign in character, and entitled as against other States to an equal right to economic development. To assign a single priority or appropriation system to an area of lands lying in more than one State is to do more than is physically necessary to the maintenance of a priority system and is to violate the principles of equality prevailing among the States by substituting the accident of prior appropriation, with its accompanying possibility of monopoly or near monopoly of use, for an equitable division which is based on reason rather than on accident and which effectuates a more substantial and equitable distribution of water.

It is not at all against soundness of the rule of equitable division that, as between individual appropriators taking water from the same interstate stream, we find instances of priority States enforcing through their courts the appropriation or priority rule regardless of State lines. That the courts occasionally do this is purely a matter of voluntary "concurrence" and not of comity or necessity. The question of equitable division between States should be raised only at infrequent intervals, after the most thorough investigation of relevant facts, and in the most solemn manner. In other words, it should be raised only by the States themselves in a suit between them for that purpose in this court in order that they and their respective citizens may have the service of the best of engineering, legal, and judicial ability. To permit private litigants to present such a question in their private litigation would result in the presentation of a paramount public question in a manner so inadequate and so annoyingly frequent that water rights in both States to the controversy would be forever uncertain as to the quantity of water, and all investment in enterprises dependent upon water correspondingly insecure. Unless and until the States themselves take formal action the interstate-priority rule makes a comparatively simple one for courts to apply as between interstate appropriators. Thus the enforcement of a principle of interstate priority in private litigation is stripped of every shred of authority as a precedent when the States themselves assert their paramount interests, thrust "concurrence" and comity aside, and engage each other in judicial combat, not for an exchange of courtesies, but for their economic life. In such an hour regard should be had only for the principles of equality in rank and right to development and to

the rule of distribution which these principles inexorably impose.

Administrative supervision and regulation of appropriations of a priority system among States, if State boundaries are to be disregarded, is impossible.

The problem in administrative supervision and regulation is not merely one of ascertaining the dates and amounts of the different appropriations concerned and fixing their respective priorities. That is exclusively a judicial function in some of the States, as in Colorado, and in other States, and in Wyoming is judicial in last analysis, because of the fact that the preliminary administrative determination is subject to judicial review. The real difficulty of administrative supervision and control arises after the priorities as to date and amount have been already determined. In all of the States there are periods of water scarcity, also appropriators who waste water, and, furthermore, there are appropriators who, if left to themselves, take water from the streams although well knowing that there are senior appropriators first entitled to be served. For this reason the States, Wyoming and Colorado included, maintain systems of administrative supervision within their respective boundaries. Administrative officers themselves open and close the headgates of the different ditches, or else direct their opening and closing, with due regard to the quantity of water in the stream and the order of priorities. These same officers prevent appropriators from taking even the amounts called for by their respective appropriations to the extent that need for the water at the particular time may not exist, since all appropriators not actually needing the water at a given time must leave it in the stream to inure to the benefit of all other appropriators above or below in the order of their priorities. On an inter-

state stream the priorities early enough in the series to be actually served with water are interlaced, unless, indeed, it may happen that all of the worth-while priorities are in a single State. Where interlaced, priority No. 1 may be in one State, No. 2 in the other State, No. 3 back in the first State, and so on. Priorities in one of the States may be seriously affected by those in the other. Administrative supervision absolutely requires that all of the priorities belonging to a unified system be subjected to unified administrative control. It is a control that is not merely annual. It is weekly, indeed, daily, if the appropriators throughout the area of the unified system are to be protected. State administrative authorities will not suffice where the appropriation system is to be maintained regardless of State lines and where, therefore, the field of necessary administrative control is geographically larger than that of the State. The administrative officers of one State have no power within another. A priority in one State cannot be protected except by supervising, not only priorities generally within the same State, but also those within the other State upon the same stream. This neither State can do, and, therefore, priority regardless of State lines becomes an impossibility in point of administration.

On the other hand, under equitable division, the daily administrative control, so indispensable to the operation of an appropriation system, offers no problem at all. Each State is allowed an equitable portion of the water of the common stream, attaches to that portion its own appropriation system, and gives to the appropriations attached to that portion the daily administrative supervision which is so indispensable. All of this is done without the slightest injury

to the other State, since the appropriations in the latter State attach to a different portion of water altogether.

Upon the question of the relative merits of interstate priority and equitable division, it may be said that the States of the Union are not provinces. They are States. By the Federal Constitution they are accorded legislative, executive, and judicial departments, a large measure of local sovereignty and a body of local law. They have their respective peoples for whom to develop their natural resources. They are equal in rank and the right to opportunity, and are to be protected in that equality. The powers of the new States are identical with those of the original thirteen. Each State takes full notice of the rights and powers of each of the others. Each State, new and old, has jurisdiction of the streams within her borders, and the inherent right to consume an equitable part of the waters of her interstate streams. Wyoming and her citizens have made use of part of the waters of the Laramie river, with full notice of and subject to the right of Colorado and her citizens to make use of an equitable part of the waters of the Laramie river, even though such rightful use by Colorado might to some degree interfere with uses which have been established by Wyoming.

In *Kansas vs. Colorado* neither the doctrine of riparian rights nor of priority of appropriations was applied, but it was there held that one State may not unreasonably appropriate the waters of a river within its borders to the injury of another State through which such river flows, and in determining the question of reasonableness of the diversion of water by a State where the rights of another State are affected, the court will give due consideration to the interests of both States.

In other words, equitable apportionment of benefits was held to be the proper rule.

If regard be had by our common Constitution to State boundaries, when it comes to legislative, executive, and judicial departments and to bodies of law of the various States, why not in respect to the waters which flow from one State into another and upon which the peoples of both States are dependent? The rule of interstate priority or priority regardless of State lines violates these principles of equality. That of an equitable division does not. The first profits one State at the expense of another. The second does not. One is a rule of interstate discrimination; the other, of interstate justice.

CONCLUSION.

In view of the intricate problems in this case, which rise above questions of mere local private right and involve important matters of State interest affecting the general welfare and future progress of sovereign Commonwealths, we feel that we are not imposing upon this honorable court in asking that a rehearing be granted, and that the opinion rendered be vacated, modified or extended, or that the decree be changed in form so as to more justly and equitably cover the matters herein set forth.

Respectfully submitted,

VICTOR E. KEYES,
Attorney General,
Solicitor and Counsel for the State of Colorado.
WILLIAM R. RAMSEY,
Assistant Attorney General,
Solicitor and Counsel for Colorado.
DELPH E. CARPENTER,
Solicitor and Counsel for
The Greeley-Poudre Irrigation District.
JULIUS C. GUNTER,
Solicitor and Counsel for The Laramie-Poudre
Reservoirs and Irrigation Company.

L. WARD BANNISTER,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is not filed for delay, and that in my judgment it should be granted.

VICTOR E. KEYES,
Attorney General,
Solicitor and of Counsel for the State of Colorado.

[Endorsed:] Supreme Court U. S., October Term, 1921. Term No. 3, Orig'l. State of Wyoming vs. State of Colorado. Petition for rehearing received August 4, 1922.

(6986)